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Office of Administrative Law Judges
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Issue Date: 13 April 2004

Case No. 2003-LHC-1564

OWCP No. 5-114540

In the Matter of

WILLIAM K. SHEARON,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Self-Insured Employer

Appearances:
Matthew H. Kraft, Esq., for Claimant
Benjamin M. Mason, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, William K. Shearon, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he was injured while walking on steel and concrete while employed by Employer, and that as a result he is suffering from bilateral foot problems.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on December 1, 2003. (TR).[1] Claimant submitted three exhibits, identified as CX 1 through CX 3, which were admitted without objection. (TR. at 14). Employer submitted five exhibits, EX 1 through EX 5, which were admitted without objection. (TR. at 16). The parties submitted one joint exhibit, JX 1, which was admitted. (TR. at 9).

The record was held open for thirty days for Employer to take the deposition of Dr. Howard M. Roesen. (TR. at 14). A transcript of the deposition was filed as Employer's Exhibit 6 on February 9, 2004. The record was also held open until February 9, 2004, for the parties to

[1] EX - Employer's exhibit; CX - Claimant's exhibit; and TR - Transcript.

file briefs. By motion dated February 25, 2004, counsel for Claimant requested an extension of time to file briefs. The extension was granted without objection, and all parties were permitted until the close of business on March 8, 2004, to submit briefs. Claimant filed his brief on March 8, 2004. Employer filed its brief on March 16, 2004, along with a motion for an extension of time in which to file the brief, which is hereby granted.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues remain disputed by the parties:

1. Whether Claimant is entitled to temporary total disability benefits from April 29, 2002, to the present and continuing;

2. Whether Employer has demonstrated the availability of suitable alternate employment that Claimant could obtain if he diligently tried;

3. If Claimant is entitled only to temporary partial disability benefits, the appropriate compensation rate based upon Claimant's loss of wage earning capacity.

STIPULATIONS

At the hearing, Claimant and Employer stipulated, and I find:

1. That they are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. That an Employer/Employee relationship existed at all relevant times;

3. That the Claimant sustained an injury to both of his feet on or about January 29, 2002 that arose out of and in the course of his employment with Employer;

4. That the Claimant gave the Employer timely notice of the injury and filed a timely claim for compensation;

5. That the Employer filed a timely First Report of Accident and a timely Notice of Controversion;

6. That the average weekly wage at the time of the injury was $778.14, which results in a compensation rate of $518.76;

7. That as a result of the injury, the Claimant was temporarily and totally disabled from January 29, 2002 to April 28, 2002 inclusive;

8. That the Claimant received sickness and accident benefits from January 29, 2002 to April 28, 2002 inclusive and Employer is entitled to a credit for sickness and accident benefits paid against any award of temporary total disability benefits awarded to Claimant for that time period.

(JX 1).

MEDICAL EVIDENCE

Claimant was seen by Dr. Howard M. Roesen of Affiliated Podiatrists, P.C., on July 23, 2001, at which time he complained of "recent increased pain" in his right foot. (CX 1a). At that time, Claimant denied any injury to the area, but did tell Dr. Roesen that he had gout a couple of months prior. Upon examination, Dr. Roesen noted "mild erythema and increased warmth and edema medially over the right foot over the PT tendon distal to the malleolus." Dr. Roesen noted no other direct pain, but that Claimant did have "[p]ain on inversion against resistance." (CX 1a). Dr. Roesen sought to "rule out acute gout vs. PT tendonitis, right." Claimant was given an injection of 0.5 cc of dexamethasone in the painful area of his foot and was told to limit activity. He was also prescribed Colchicine three times per day. Claimant was instructed to take Naprosyn if the pain did not subside in two days, but to contact Dr. Dahdah before doing so. (CX 1a).

Claimant was seen again at Affiliated Podiatrists on January 22, 2002. The notes from this visit are somewhat illegible. The readable portion notes a "lesion plantar 2nd met L/F ([illegible] neuroma) Also problems under 2nd met R/F. [Illegible] possible [illegible] reaction to surgery. [Illegible] for blood work. Pre op instruction scheduled for neuroma excision plantar 2nd met L/F." (CX 1a).

A doctor at Affiliated Podiatrists performed surgical excision of a "planter neuroma or fibroma 2nd met L/F" on Claimant on January 29, 2002. (CX 1a). The remainder of the note from this date is illegible.

Claimant was prescribed Naprosyn, 500 mg twice per day by Affiliated Podiatrists for what appears to read gout on February 5, 2002. It is also noted that Claimant was experiencing recurring pain. The remainder of the note is illegible. (CX 1a).

Claimant had the sutures from his surgery removed on February 12, 2002, at Affiliated Podiatrists. Some pain and swelling were noted, and it appears that surgery was scheduled for Claimant's right foot. Pre op instructions were reviewed for a neuroma excision on the "Plantar 2nd met R/F." It also appears that Claimant was instructed to "stay out of work." (CX 1a).

Surgical excision of "neuroma plantar 2nd met R/F" occurred on March 5, 2002, and was performed by a doctor at Affiliated Podiatrists. Post op instructions were given. (CX 1a). The remainder of the entry for March 5, 2002, is illegible.

Claimant had sutures removed on March 12, 2002, at Affiliated Podiatrists. Pain and swelling were noted. Claimant was told to stay out of work for one more month. (CX 1a). A few words at the beginning and middle of this entry are illegible.

Affiliated Podiatrists contacted Aetna on March 12, 2002, to have Claimant's disability extended for four additional weeks. (CX 1a).

One remaining suture was removed from Claimant's foot on March 19, 2002, at Affiliated Podiatrists. It was also noted that Claimant had some pain and swelling. (CX 1b).

Claimant returned to Affiliated Podiatrists on April 2, 2002, and complained of pain in his right heel. Illegible words follow, then "May use steroid. [Illegible] 200 mg [illegible]." (CX 1b).

Claimant was seen again at Affiliated Podiatrists on April 9, 2002, at which time only slight improvement in his condition was noted. "[Illegible] 1/2 cc [illegible] 2nd met bilat Surgical sites-1 also same med [illegible] Rt heel [illegible]. Pt having some [illegible] problems from diabetes med." was also noted. (CX 1b).

Claimant returned to Affiliated Podiatrists on April 16, 2002, at which time "No significant change" on Claimant's foot problems was noted. He was given soft soles for his heel problems. He was also given "[illegible] 1/2 cc [illegible] Rt heel Must consider not using steroid due to diabetes." (CX 1b).

Affiliated Podiatrists called Aetna again on April 16, 2002, to inform them that Claimant would not be returned to work on April 22, 2002, as scheduled. (CX 1b).

On April 23, 2002, Claimant was seen at Affiliated Podiatrists, at which time improvement was noted as was "added met pads bilat." Claimant was informed that he could return to work and "[Illegible] adjusted R crutch for ankle pain." (CX 1b).

In a letter dated April 30, 2002, Dr. Steven Seltzer from Affiliated Podiatrists wrote that Claimant was under his care for treatment of a neuroma in both of his feet. Dr. Seltzer also wrote "After all conservative efforts, attempt at correction was performed on March 5, 2002 for the right foot, and on January 29, 2002 for the left foot." He also noted that Claimant had been released to return to work without any restrictions, and that Claimant was told to follow up if he had any difficulties. (CX 1c).

A "Return to Work" slip dated April 30, 2002, and signed by Dr. Seltzer, noted that Claimant was under his care for "Post Operative Neuroma excision—Bilateral" and was able to return to work on April 29, 2002, "100%" and without restrictions. The slip also notes that Claimant was unable to work between January 29, 2002, through April 28, 2002. (CX 1d).

Claimant was seen at the shipyard clinic on April 30, 2002, at which time R.A. Hall, RN noted, using the SOAP method, that Claimant had "Post operate B foot cane. Has been OOW

since 1/29/02 & to RTW 4/29/02." Nurse Hall also noted that Claimant did not bring any paperwork regarding his foot condition with him. She observed that Claimant had a limp and "c/o being sore yet." Claimant told Nurse Hall that he had bilateral neuromas that were excised on both feet. For the "P" portion of SOAP, Nurse Hall noted "Cont. P.O. until medicals are received & evaluated by Dr. Apostoles before returning to work." (CX 3a; EX 1a).[2]

Another "Return to Work" slip dated June 11, 2002, was signed by Dr. Roesen. It noted that Claimant was under his care for "Chronic Foot Pain." In the remarks section, Dr. Roesen noted, "Patient is unable to return to work due to gout complications and is excused from Jan 29 02 thru June 17, 02. We are referring pt. to family Dr." (CX 1e).

Dr. Seltzer wrote a letter to Claimant's counsel on July 23, 2002. In the letter, Dr. Seltzer noted that Claimant was initially seen in his office in 1991 and was treated "for a number of foot problems to the present time." According to Dr. Seltzer, neuromas were first noted on Claimant's feet in 1994, with a "neuroma in the 2nd space, left foot" being surgically removed on June 16, 1995. Claimant was seen again for neuroma problems on January 11, 2001, and from time to time that year with "no significant improvement." (CX 1f).

Dr. Seltzer noted the dates of the surgeries to Claimant's feet in 2002 to remove neuromas (January 29–left foot; March 25–right foot). Dr. Seltzer wrote that it was his "considered opinion that the concrete and steel surfaces that are involved in Mr. Shearon's work have contributed significantly to the formation of these painful tumors. It is our hope that the surgeries that have been performed will help to alleviate these problems." (CX 1f).

Claimant visited the shipyard clinic again on August 1, 2002, and told C. Robinson that he had experienced problems with his feet since 1995, and that he had a neuroma removed. Claimant related to C. Robinson that his condition was caused from working on steel. Claimant gave C. Robinson a letter from Dr. Seltzer to his counsel. Claimant stated that he sought "to make a W/C claim for his feet" and that he had been out of work since January 29, 2002, "with B feet" and was out of work at that time. C. Robinson also noted "PCP is Dahdah Next appt. with PCP for gout is within a month – was referred to PCP from Dr. Seltzer. 8/28/02 is next appt." The notes also include "To Dr, then Claims Facilitator after 2954 completed." (CX 3a; EX 1a).

A second entry in the shipyard clinic's notes on August 1, 2002, is signed only with "W." There is no indication if this individual is a doctor or a nurse. Using the SOAP method, this individual noted that Claimant had "much pain in ft. – has been under care of podiatrist – but medication for this has aggravated gout – he also is DM (80^{u} twice a day) with nephropathy (under care of Dahdah)." The notes also state that bilateral neuromas were excised from Claimant's feet (Left–January 29, 2002; Right–March 25, 2002) by Dr. Seltzer. Claimant told this individual that it was painful to walk and that he was not ready to return to work. Under "O," it was noted "Nodular area rt. Elbow (olecranon) tenderness on palp of MIP I & II both

[2] Both Claimant and Employer submitted copies of clinic notes from the Newport News Shipbuilding Clinic. The parties were informed during the hearing that the notes were difficult to read and were instructed to submit typed copies of the notes within thirty days of the hearing. (TR. at 15). Counsel for Employer submitted a typed copy of the notes on December 30, 2003, asking that the typed notes be included in Employer's Exhibit 1. No objection was filed, and therefore, the typed notes are included in Employer's Exhibit 1.

feet." It was also noted "Hx of DM & Gout ? diabetic nephropathy." Finally, this individual noted "Pt will bring clinical summary from both Dr. Seltzer's office & Dr. Dahdah's offices." (CX 3b; EX 1a-b).

Claimant was seen and examined by Dr. James K. Mantone of Tidewater Orthopaedic Associates on August 21, 2002. Claimant was referred to Dr. Mantone from the shipyard clinic and from Dr. Dahdah for consultation for his feet. Claimant told Dr. Mantone that the pain began in his feet approximately July 23, 2002, and complained of plantar pain in the forefoot. Claimant told Dr. Mantone about his surgery and noted that he continued to have difficulty following the surgery. Claimant related to Dr. Mantone that the neuromas that were removed in January and March, 2002, were "'the size of marbles.'" Dr. Mantone noted that Claimant had no burning, numbness, or tingling, but that he experienced a gout attack following the surgery. Claimant related that he had had gout attacks in his right elbow, right knee, and both ankles. According to Claimant, the gout was addressed with Allopurinol prescribed by Claimant's renal physician, which he continues to take. (EX 2a).

Claimant stated that his right foot was causing him more difficulty than the left foot, describing the pain as a "soreness." Claimant observed his feet "like a hawk" because of his diabetes. Claimant told Dr. Mantone that it felt like he was walking on something and that he did not have any callouses. Claimant had tried medicine and shots to relieve the pain, including cortisone, which eased the symptoms but did not completely relieve them. Dr. Mantone noted that Claimant had been "quite inactive" following the gout, and that he cannot stand for any period of time or walk a significant distance. As to other pain, Claimant noted that he experienced pain when he bent his toes and that it did not seem like his toes would straighten. (EX 2a-b).

Dr. Mantone noted Claimant's medical history, including diabetes, chronic renal disease, and hypertension. When Dr. Mantone saw Claimant, he was on several medications, including Lasix, Insulin, Colchicine, Cozaar, Protonex, Potassium, Lipitor, Zoloft, Nadolol, and Skelaxin. (EX 2b).

Upon examining Claimant, Dr. Mantone found that Claimant was in a "moderate amount of distress," had a "moderate antalgic gait," appeared older than his stated age, was "moderately obese" and wore appropriate footwear. Dr. Mantone examined Claimant's right upper extremity, where he noted tenderness in Claimant's olecranon, as well as "some mild thickening of the olecranon bursa." Dr. Mantone also observed mild warmth and erythema, with irritable motion at the end arc, flexion and extension "with the former being greater." (EX 2b).

As to Claimant's lower extremities, Dr. Mantone wrote that Claimant was "markedly tender over the metatarsal phalangeal joints of two and three" and the webspace was mildly irritable. Dr. Mantone found the incisions well healed and no sign or symptom of infection, but did find peripheral edema bilaterally. He also noted that Claimant's foot was warm "but it is difficult to appreciate dorsalis pedis." Dr. Mantone found no callouses or corns, and noted Claimant's calf was nontender. Dr. Mantone could not elicit Claimant's reflexes. (EX 2c).

As to Claimant's X-rays, Dr. Mantone noted that he reviewed "poor quality podiatric style radiographs." He found "slight squaring of the articular surface of the second metatarsal head. There are no frank findings of avascular necrosis. There is some mild degenerative change with sclerosis of the first MTP joint. There is [*sic*] no stress fractures. No evidence of Charcot arthropathy." (EX 2c).

Dr. Mantone's assessment of Claimant was as follows:

1. MTP synovitis, two and three, right greater than left.
2. Metatarsalgia.
3. Gout.
4. Hypertension.
5. Diabetes mellitus.
6. Chronic renal insufficiency.
7. Morbid obesity.
8. Back pain.

(EX 2c).

On August 26, 2002, an MRI was performed on Claimant's right foot by Dr. James J. Rinaldi. Claimant was referred to Dr. Rinaldi by Dr. Mantone. Upon examining the MRI, Dr. Rinaldi noted "no definitive signal abnormalities noted within the plantar aspect of the right foot; specifically, there are no conclusive criteria for a Morton's neuroma. There is mild flattening of the second metatarsal head, also noted on conventional radiography, which may represent a congenital variation, as normal marrow signal characteristics are maintained." Dr. Rinaldi found "no conclusive MRI criteria for avascular necrosis involving the second metatarsal head. . . . Incidental degenerative change first MTP articulation." He also noted that "this study was designed to evaluate the forefoot." Dr. Rinaldi's impression was "MRI right forefoot unremarkable aside from first MTP degenerative change." (EX 3).

Dr. Roesen noted on July 14, 2003, that Claimant has been his patient since June, 2002, when Dr. Seltzer retired. Dr. Roesen noted that Claimant continued to "have chronic pain in both feet and is unable to stand or walk for any length of time." Dr. Roesen also noted that "[a]t this point it is hard to 'clear' him for any specific job" and that Claimant related to him that "his pain is significant and he is unable to get around for any length of time." As of July 14, 2003, Dr. Roesen was not considering additional surgery, but was contemplating sending Claimant to a clinic for chronic pain. (CX 1g).

In a letter dated July 31, 2003, Dr. Roesen informed Claimant's counsel that he wanted to refer Claimant to MCV Hospital to see Dr. Adalar, and that Claimant has chronic foot pain and diabetes. (CX 1h).

In a letter dated September 23, 2003, Dr. Roesen responded to the denial of the referral of Claimant to see Dr. Adalar. Dr. Roesen noted Claimant's continued foot problems, which he determined to be work related; Dr. Roesen also noted that his opinion to this extent had not changed. Dr. Roesen opined that Claimant's diabetes and kidney disease were not impacting his

work-related foot problems. Dr. Roesen wrote "As he continues to have problems, I think a second opinion would be of benefit to him in hope of resolving his pain." (CX 1i).

Dr. Roesen signed and dated a letter on October 7, 2003, in response to a request from Claimant's counsel to confirm their telephone conversation on October 2, 2003. Dr. Roesen confirmed that Claimant could not have returned to his full-duty, pre-injury job from June, 2003, to present due to his work-related foot problems. Dr. Roesen also confirmed that the condition for which he has treated Claimant was the same condition for which Dr. Seltzer treated him prior to Dr. Seltzer's retirement. (CX 1j).

Dr. Roesen also signed and dated a letter on October 28, 2003, in response to a request from Claimant's counsel to confirm their telephone conversation on October 27, 2003. Dr. Roesen confirmed that Claimant was at a higher risk for the onset of gout as a result of the neuroma surgeries in early 2002. He also confirmed that Claimant was unable to return to full-duty pre-injury work following his release on April 29, 2002, because of his work-related foot problems, specifically neuromas, metatarsalgia, and chronic heel pain. (CX 1k).

Dr. Khalil B. Dahdah signed and dated a letter on October 31, 2003, in response to a request from Claimant's counsel to confirm their telephone conversation on October 28, 2003. Dr. Dahdah confirmed that "while surgery generally does not cause gout, surgery or trauma can trigger pain and other symptoms in a person who has gout or who is pre-disposed to gout." (CX 2a). Dr. Dahdah also attached literature on gout to his response. (CX 2b-k).

DISCUSSION OF LAW AND FACTS

It is undisputed that Claimant suffered an injury to his feet on or about January 29, 2002, that arose out of and in the course of his employment with Employer, and that such employment is subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act. (JX 1). Employer has not disputed that the accident occurred or that Claimant suffered a harm as a result of the January 29, 2002, accident. However, Employer argues that Claimant's injury was resolved as of April 29, 2002. Thus, the dispute is whether Claimant's complaints regarding the pain in both of his feet after April 29, 2002, are the result of his work injury on or about January 29, 2002.

Testimony of Claimant

Claimant is a forty-seven year old pipefitter employed by Employer for approximately twenty-eight years at the time of his injury on January 29, 2002. (TR. at 17-19). At the time of his injury, Claimant was restricted from lifting more than forty pounds due to a previous back injury; his job in the pipe shop was within these restrictions. (TR. at 20, 34). Claimant testified that he started experiencing discomfort five to six months prior to January 29, 2002. Claimant had a similar problem in 1995, and Dr. Seltzer performed surgery in 1995 to correct the problem. However, Claimant did not experience any problems with his feet between 1995 and 2002 other than heel spurs. (TR. at 21).

When he was injured on approximately January 29, 2002, it felt like "[w]alking with a ball on the bottom of your feet" or like "walking on a marble. (TR. at 21, 30). Claimant also said that he experienced "constant pain" and "It was bad walking on your feet." The pain emanated from the middle of the ball of his foot in both of his feet. (TR. at 22). The neuromas were removed by Dr. Seltzer in January and March, 2002. (TR. at 22). Claimant stated that the neuromas were located underneath the toes, between the second and third metatarsal, and that one neuroma was removed from each foot. (TR. at 30).

Following the surgeries, Claimant felt his condition was improving, and his feet did not bother him when he wore tennis shoes. (TR. at 22). Claimant states that he returned to work on April 28, 2002. (TR. at 22). Claimant testified that he did experience discomfort during the three hours that he worked on that day but that he "needed to try to go back to work." He stated that he "couldn't get comfortable nowhere" and that the pain was in the same area on both feet when he wore his steel-toed shoes. (TR. at 23, 28). Claimant also testified that since the surgeries, he has never been pain-free in his feet, but the pain has decreased. (TR. at 34, 44).

Claimant had worked for approximately three hours when his boss directed him to visit the shipyard clinic. (TR. at 22). According to Claimant, Employer passed him out of work because he only provided Employer with a doctor's slip that noted the number of days he was out of work. (TR. at 22-23, 36). Claimant got his medical records from Dr. Seltzer's office the same day that Employer passed him out of work, but as of the date of the hearing, he had not taken them back to the shipyard clinic because he was unable to walk. (TR. at 36). Claimant did return to the shipyard in August, 2002, to file a workers' compensation claim, but did not take any of his medical records with him because he did not feel that he was able to return to work. (TR. at 37-38). Claimant also testified that Dr. Seltzer told him that he would be taken out of work until July, so he did not feel it was necessary to take his medical records to the shipyard clinic. (TR. at 38).

Claimant resumed treatment with Dr. Seltzer on April 28, 2002, at which time Dr. Seltzer prescribed gout medication for him. (TR. at 23). Claimant's foot problems and pain were the same at the time of the hearing as before he returned to work on April 28, 2002. He wakes up at night from the pain. (TR. at 23-24). Claimant also has diabetes and has problems with gout in his feet, hands, right elbow, and his right ankle. (TR. at 24-25, 30). Claimant began notice gout-related symptoms approximately one to one and one-half months following his second surgery in 2002. (TR. at 25). Claimant stated that the gout causes pain and swelling. (TR. at 33). Claimant testified that he had a prior incident with gout in his feet in 2001, and that Dr. Seltzer gave him medication for gout at that time as well. (TR. at 31). According to Claimant, Dr. Seltzer prescribed the same gout medication each time Claimant had an incident of gout. (TR. at 31-32).

Claimant does not feel that he could return to the work he did prior to the neuroma diagnosis because his job requires him to wear steel-toed shoes, which bother his feet. Also, the job required him to be on his feet and did not allow him to sit down. (TR. at 25-26). Claimant stated that prior to returning to work, he wore tennis shoes, which did not bother his feet. (TR. at 28). Since then, Claimant has experienced pain with any footwear he tries to wear, including steel-toed shoes and house slippers. (TR. at 28). He has tried on his steel-toed shoes

approximately six times since April 28, 2002, for fifteen to twenty minutes at a time, just to see how it felt. (TR. at 28-29). Claimant wore Rockport shoes, which he described as softer, orthopedic shoes, to the hearing, though he stated that those shoes also caused his feet to hurt. (TR. at 29).

Claimant testified that he has never worked as a security guard, cashier, dispatcher, or a customer service representative or worker. (TR. at 26). Claimant does not think he could perform those jobs if they required him to stand for a period of time. Claimant also stated that he cannot sit in one spot too long because of his back and feet. He does feel that he could try to do those jobs if he were trained. (TR. at 27). On cross-examination, Claimant testified that he had never performed pipefitting work prior to working for Employer, but that he was trained to do the job and performed it well for twenty-eight years. (TR. at 27-28).

Claimant met with William Kay, Employer's vocational consultant, who administered tests to determine Claimant's level of education. (TR. at 39). Mr. Kay sent Claimant a list of nine jobs. (TR. at 39-40). Claimant testified that he told Dr. Roesen that he did not feel that he could do the jobs listed by Mr. Kay because he would be unable to focus due to the pain in his feet. (TR. at 42). Claimant believed that if the pain went away, he could go back to work for Employer. (TR. at 42). However, Claimant had not applied for any other jobs at the time of the hearing. (TR. at 43).

Testimony of William Kay, Vocational Consultant

After Claimant's counsel stipulated that Mr. Kay qualified as an expert in vocational rehabilitation, Mr. Kay testified regarding a labor market survey he performed on Claimant's case in June, 2003. (TR. at 46). Mr. Kay met with Claimant on one occasion, May 6, 2003, prior to completing the labor market survey, at which time he interviewed Claimant to determine if he had been looking for work, what his physical restrictions were, and to test Claimant's level of education. (TR. at 46-47, 52).

Mr. Kay administered the "Wonderlic" test to Claimant to measure his reading and math abilities; according to Mr. Kay, Claimant's math abilities were "the highest you can make on this particular test," which was at grade level 12.5. (TR. at 49). Claimant scored at the 9.5 grade level for reading; when combined with the math score, Claimant's abilities yielded a composite score of grade level 12. (TR. at 50).

In addition to his educational abilities, Mr. Kay also took into consideration his educational background and medical information. (TR. at 51). Mr. Kay considered Claimant's permanent restrictions from a neck injury in 1996, and permanent restrictions from January, 2001, following neck, shoulder, and back injuries. (TR. at 52). Mr. Kay did not have any information regarding restrictions for Claimant's feet injuries, though Employer did request that Mr. Kay focus on light-duty jobs in his labor market survey. (TR. at 52-53). Mr. Kay also knew from meeting with Claimant that Claimant could not stand or walk for long periods of time. (TR. at 54). Mr. Kay did not take into account any problems Claimant was having with gout, nor his illnesses of hypertension and diabetes. (TR. at 73, 81). Mr. Kay also did not contact Dr. Roesen to ascertain any specific physical restrictions for Claimant. (TR. at 79). During his

interview with Mr. Kay, Claimant told him that he did not feel that he was able to work, that he had not been actively seeking work, and that he had been receiving sickness and accident benefits. (TR. at 52).

Mr. Kay testified that he located nine positions that he felt were appropriate considering Claimant's condition and that Claimant could perform if he diligently tried. (TR. at 54, 80). Mr. Kay categorized these jobs as customer service entry level, unarmed security, cashier, and dispatcher. (TR. at 55). According to Mr. Kay, in his experience in placing individuals with the businesses that he identified, the businesses never required an individual to work outside their restrictions, and for the jobs identified for Claimant, the person would be able to sit most of the time. (TR. at 55-56). Mr. Kay sent the job analysis to Dr. Roesen, who did not specifically approve or disapprove the jobs identified. (TR. at 71).

Specifically, Mr. Kay identified positions as a donation center attendant with Good Will Industries; a greeter with Wal-Mart; an unarmed security guard with Security Services of America; a cashier at a car wash; a dispatcher with Digital Security; and a dispatcher with Associated Cabs. (TR. at 56-62). The job with Good Will Industries would require an individual to sit at a donation booth, usually located in a Wal-Mart parking lot, and provide receipts for donations. (TR. at 57-58). According to Mr. Kay, this position did not require any heavy lifting. Mr. Kay spoke with Goodwill Industries seven different months between March, 2002, and April, 2003, and they were "hiring off and on" prior to and after Mr. Kay completed the labor market survey. (TR. at 57-59). This can be either a part-time or full-time position. (TR. at 70).

The position at Wal-Mart as a greeter was located at the Wal-Mart/Sam's Club at Chesapeake Square in Chesapeake, Virginia, which according to Mr. Kay was fifteen to eighteen miles from where Claimant resided. (TR. at 60-61). In Mr. Kay's experience, Wal-Mart hires for this position four to five people per year. (TR. at 62). This position would require an individual to stand or sit on a stool either at the store's entrance or exit. (TR. at 62-63). According to Mr. Kay, the shifts as a greeter at Wal-Mart would be between five and eight hours, "it's not necessarily a 40-hour position." (TR. at 76).

The unarmed security position would require an individual to take a true/false test to get a license. (TR. at 64). Security Services of America provides security services for locations such as parking lots, motels, or clinics. (TR. at 65). According to Mr. Kay, a job such as the motel monitoring position would require an individual to sit at a desk and monitor activity within the motel at night, such as when school tour groups stay there. The job would not require an individual to take any action if students were causing problems other than talking with chaperones of the group. (TR. at 66-67). Mr. Kay testified that most of these jobs were in Williamsburg, Virginia, approximately twenty-five miles from where Claimant resided. (TR. at 66). Mr. Kay also identified a security position with Atlantic Protective Services, which he stated provided security services to the City of Norfolk, Virginia, who placed security guards at locations such as libraries. (TR. at 67). According to Mr. Kay, these businesses will discuss an individual's restrictions and place them in a location that fits their restrictions. (TR. at 65, 76). Both of these positions are typically full-time positions. (TR. at 70).

As to the position with Digital Security in Hampton, Virginia, Mr. Kay testified that he did not know the number of people that Digital Security usually employs. However, he did state that the business is open twenty-four hours per day, and that there are three shifts. (TR. at 77-78). As to the job with Associated Cabs, Mr. Kay testified that the business usually hires two extra people "because they have a difficult time keeping people on the nightshift." (TR. at 78).

Mr. Kay also identified positions on the Chesapeake Toll Road and with the Norfolk Airport Authority. According to Mr. Kay, there was a great demand for employees at the Chesapeake Toll Road at one point "because the city was not hiring enough people." (TR. at 82). Mr. Kay stated that this position would be located on "the toll road that goes to North Carolina." (TR. at 81).

On cross-examination, Mr. Kay testified that he frequently used many of the jobs listed in Claimant's labor market survey because he is familiar with the job and knows when the businesses hire. (TR. at 74-75). He also stated that Claimant could earn an average wage of $6.50 per hour, or $260.00 per week. (TR. at 79-80).

Mr. Kay also testified that he sent the list of positions and job descriptions to Dr. Roesen. However, Dr. Roesen did not specifically approve or disapprove any of the positions. Instead, he sent Mr. Kay a letter, dated July 14, 2003, which stated that "At this point it is hard to 'clear' him for any specific job. With both his feet and medical problems you may have to go over with him in more detail what the jobs require." (TR. at 70-72 (citing CX 1g)). At no time did Mr. Kay contact Dr. Roesen to ascertain Claimant's physical restrictions. (TR. at 78).

Deposition of Dr. Howard M. Roesen

Dr. Roesen was deposed on February 4, 2004. (EX 6). Dr. Roesen is a podiatrist who has been in practice for twelve years. (EX 6, at 3-4). Dr. Roesen took over the treatment of Claimant when Dr. Roesen's partner, Dr. Seltzer, retired in June, 2002. (EX 6, at 5-6). Dr. Roesen was aware that Dr. Seltzer had released Claimant to return to full duty work approximately April 30, 2002. Dr. Roesen saw him after that on May 1, 2002, when Claimant complained of a high level of discomfort in both of his feet. (EX 6, at 6-7). The pain was in the same area of the foot that Claimant had had problems before, and in Dr. Roesen's opinion, the problems Claimant was experiencing on May 1, 2002, continued to be work-related. (EX 6, at 29). At that point, Dr. Roesen recommended that Claimant stay out of work an additional three to four weeks and to limit his activity. (EX 6, at 8, 31).

Dr. Seltzer saw him again on May 21, 2002, at which time Claimant was still experiencing pain with his feet, particularly in the areas where the neuromas were removed, as well as in the heels. (EX 6, at 8). According to Dr. Roesen, the pain that Claimant was experiencing in his heels was not a result of any surgery to that area, but was most likely caused by compensating when Claimant was trying to keep the pressure off of the front portions of his feet. (EX 6, at 9). Dr. Roesen saw Claimant on June 11, 2002, and told Claimant to stay out of work until June 17, 2002. (EX 6, at 9-10). At that point, Claimant was also experiencing complications from gout. (EX 6, at 10). Dr. Roesen testified that in his opinion, Claimant was experiencing greater pain when he saw him on June 11, 2002, than when he saw him in May,

2002, and that the pain was in the forefoot area of both feet. According to Dr. Roesen, this is the same area where Claimant had surgery but also the same area where he had gout. (EX 6, at 12).

After June 11, 2002, Dr. Roesen did not again see Claimant until January 23, 2003, when Claimant still had "a large amount of pain below the second metatarsal head area." (EX 6, at 13). At that point, Claimant had had an MRI performed on his right foot and had discussed surgery with Dr. Mantone. According to Dr. Roesen, Claimant's pain on January 23, 2003, was "below the second metatarsal head, a little bit around the second inner space, but a lot of it was right below that second metatarsal head area." (EX 6, at 13). The neuroma was removed from the second inner space, which is located next to the second metatarsal head. (EX 6, at 13). Dr. Roesen reviewed the MRI report; however, he stated that the report was equivocal in that it showed no "significant changes" other than "some flattening of the metatarsal head." Dr. Roesen had detected a palpable cyst on the second metatarsal head, but the cyst did not show up on the MRI. (EX 6, at 14-15). As to the flattening of the metatarsal head, Dr. Roesen testified that this condition is not usually related to the removal of neuromas; the MRI was inconclusive regarding the cause of that condition and noted that it could have been congenital. (EX 6, at 32-33).

Since January 23, 2003, Dr. Roesen saw him on four subsequent occasions: June 9, 2003; June 17, 2003; October, 2003; and January 9, 2004. Dr. Roesen's partner, Dr. Wolfson, saw Claimant in May, 2003. At these meetings, Claimant complained of pain in the area below the second metatarsal head, with the pain the right foot being slightly worse than in the left foot. (EX 6, at 16).

Dr. Roesen explained that a neuroma is "an inflamed nerve, an inflamed inner digital nerve that runs between the metatarsal heads." (EX 6, at 7). According to Dr. Roesen, neuromas can be caused by a variety of factors, including shoe wear, trauma, and over-use. (EX 6, at 8). Dr. Roesen described metatarsalgia as a "generalized pain in the forefoot at the metatarsal heads" that can be caused by "an atrophy of the fat pad, or a thin fat padding on the front of the foot . . . Sometimes just over-use, being on your feet a lot causes discomfort in the area. Basically, an inflammation below the metatarsal heads. Neuromas can cause this type of pain also." (EX 6, at 25-26). According to Dr. Roesen's records, Claimant was experiencing both pain from the neuromas and from metatarsalgia, and continues to have pain below the second metatarsal head. (EX 6, at 26-27, 35).

He also explained the causes of gout. According to Dr. Roesen, gout is "an inflammatory arthritis which is caused by increased uric acid in your body that you produce or that you're not able to get rid of, and can cause pain in certain joints." (EX 6, at 10). Dr. Roesen further testified that gout can be caused by surgery or can be aggravated by surgery, more particularly, by an increase blood flow to the area of the surgery. (EX 6, at 10-11, 30, 34). Dr. Roesen was aware that Claimant also had kidney problems, which he stated can be a precursor for or cause of gout, since one of the functions of kidneys is to remove uric acid from the body. (EX 6, at 11). According to Dr. Roesen, if gout is going to occur, it is generally seen within one to two weeks after surgery, though he has seen patients develop gout as long as four weeks after surgery. (EX 6, at 35).

Dr. Roesen also testified that diabetes can cause different foot problems, including limiting circulation in the feet and affecting the nerves in the feet. (EX 6, at 34). However, Dr. Roesen believed that Claimant did have adequate circulation but did not believe he had any significant neuropathy, which he described as "like an injury to the nerves from the excess sugar in the body, and that can cause numbness." (EX 6, at 34). Overall, Dr. Roesen saw no link between Claimant's diabetes and his foot problems. (EX 6, at 34). Though he did state that diabetes could complicate the healing process, Dr. Roesen did not believe this occurred in Claimant's case. (EX 6, at 34).

Dr. Roesen could not definitively testify that the neuromas or the surgery to remove the neuromas caused the gout. Dr. Roesen observed that "He was having a lot of pain in both of his feet and, like I said, at that point it's really hard to say what's causing most of his pain, the neuromas, or the surgery, or the gout at that point. But [the gout] does, when it hurts, that's usually what takes precedence over anything. . . . [U]sually when the gout hurts, that's much worse than any type of neuroma pain you would have." (EX 6, at 11-12). Drs. Roesen and Seltzer referred Claimant back to his primary care physician when he began having problems with gout. (EX 6, at 24).

Dr. Roesen testified that it was not common for a patient to continue to experience pain almost two years after removal of neuromas, as patients generally improve after surgery. Dr. Roesen felt that Claimant's pain was probably caused by a combination of things. (EX 6, at 18). Referencing Dr. Mantone's office notes from August 21, 2002 (EX 2), Dr. Roesen opined that Claimant's problems of gout, hypertension, and morbid obesity could cause pain or be complicating factors in Claimant's pain. (EX 6, at 18-19). Dr. Roesen testified that he does not believe that the surgery has caused all of the pain Claimant is experiencing, although the pain seemed to lessen until Claimant tried to go back to work. (EX 6, at 20).

In Dr. Roesen's opinion, Claimant's metatarsalgia and neuroma pain were "caused by over-use and being on hard surfaces" as was his heel pain. Dr. Roesen also opined that Claimant's neuroma pain could have been caused by wearing steel-toed shoes because "a lot of times it cramps the toes and causes that neuroma pain also." As to Claimant's gout, Dr. Roesen though it was "not necessarily related to over-use. That's a systemic arthritis, systemic inflammatory arthritis." (EX 6, at 28). Dr. Roesen testified that the pain Claimant experienced on May 1, 2002, was work-related, and at least some of his pain is related to those same problems. (EX 6, at 29).

When asked whether Claimant could return to some form of work, Dr. Roesen stated that the problem arises when Claimant stands for any length of time; otherwise, he could function and work a sedentary job. (EX 6, at 21). In Dr. Roesen's opinion, Claimant "probably would have had a hard time even getting back from the parking lot inside" when he saw Claimant in June, 2002; however, when he saw him in January, 2003, at that point, Claimant probably could have done some sedentary work. (EX 6, at 32). In Dr. Roesen's opinion, Claimant should not walk or stand more than five to ten or ten to fifteen minutes at a time every two hours, though he did believe that Claimant would have to try this on a "trial basis." (EX 6, at 21-22). Dr. Roesen maintained his opinion that Claimant could not return to the full duties of the job he had prior to 2002 because of his physical problems that were work-related. (EX 6, at 30).

As of the date of Dr. Roesen's deposition, Claimant did not have another scheduled appointment with the doctor, but Dr. Roesen had referred Claimant to Dr. Adalar in Richmond, Virginia, but this referral was denied under Claimant's workers' compensation coverage. (EX 6, at 23). Claimant was still covered by his own health insurance, and according to Dr. Roesen, Claimant had an appointment scheduled with Dr. Adalar on February 6, 2004. (EX 6, at 23).

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614-15 (1982); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom*. *Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Indus.*, 455 U.S. at 615.

Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

Claimant asserts that he is entitled to the Section 20(a) presumption, as he has suffered from bilateral foot problems including neuromas, metatarsalgia, and bilateral heel pain at all times since the date of his injury. (Claimant's Brief, at 14). Further, Dr. Roesen testified that Claimant's neuromas, metatarsalgia, and bilateral heel pain are all related to his work, including overuse and standing and walking on hard surfaces. Dr. Roesen further testified that Claimant's pain since the injury and surgeries have included the areas where the neuromas were located. Claimant also asserts that when he attempted to return to work, which required him to wear steel-toed boots, his pain increased and returned to Dr. Roesen's office. Dr. Roesen again took Claimant out of work. (Claimant's Brief, at 14). Claimant further argues that, to the extent that Claimant suffers from gout, the Section 20(a) presumption should also apply, as the evidence shows that the gout is related to the surgeries to remove the neuromas. (Claimant's Brief, at 15-16)

To invoke the presumption, all that claimant must show is that he suffered a harm and that employment conditions existed or a work accident occurred that could have caused, aggravated, or accelerated the condition. That an injury occurred is undisputed. That Claimant suffered an initial harm is undisputed. Claimant testified credibly that he had pain after he returned to work at the shipyard. (TR. at 23-28). He also testified that he continues to

experience pain. (TR. at 28). His medical records confirm that Claimant has been treated for pain in his feet.

Upon consideration of the evidence as well as the stipulations entered by the parties, I find that Claimant has established a prima facie case for compensation and is entitled to the presumption of Section 20(a) that his complaints of pain in his feet after April 29, 2002, are causally related to his work injury on January 29, 2002. The burden of proof then shifts to Employer to rebut the presumption with substantial countervailing evidence.

Rebuttal of Section 20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence that establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991); *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). Substantial evidence is relevant evidence such that a reasonable mind might accept it as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Universal Camera Corp. v. Nat'l Labor Relations Bd*., 340 U.S. 474, 477 (1951); *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Dearing v. Director, OWCP*, 998 F.2d 1008, at *2, 27 BRBS 72, 75 (CRT) (4th Cir. 1993) (unpublished) (per curiam); *Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967); *Smith v. Sealand Terminal, Inc*., 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *See Am. Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 817-19 (7th Cir. 1999); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

The employer may also rebut the presumption with negative evidence, but again, negative evidence must be "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton*, 554 F.2d at 1083. Employer cannot rebut the presumption on the basis of suppositions or equivocal testimony. *Dewberry v. S. Stevedoring Corp.*, 7 BRBS 322, 325 (1977), *aff'd mem.*, 590 F.2d 331 (4th Cir. 1978). Rather, Employer must show either facts or negative evidence that is both specific and comprehensive to overcome the presumption. If the employer presents specific and comprehensive evidence sufficient to sever the connection between a claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1981); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986).

Employer argues that any disability that Claimant suffers after April 28, 2002, is not caused by his work-related foot condition, but rather, is related to other medical problems from

which he suffers. Employer points out that Claimant had surgery to remove neuromas in 1995 and did not have any problems following those surgeries. (Employer's Brief, at 13). Also, when Dr. Seltzer released Claimant to return to work, he did so without placing any physical restrictions on Claimant. (Employer's Brief, at 17). Employer further argues that Claimant went to the shipyard clinic not because he was having pain in his feet, but because Employer needed him to bring in additional medical records regarding his surgery and absence from work. Claimant failed to deliver the medical records to the shipyard clinic, and Employer asserts that this is the reason that Claimant was not able to return to work, not because of pain in his feet or difficulty in walking. (Employer's Brief, at 14).

To this extent, Employer argues that when Claimant saw Dr. Seltzer after leaving the shipyard clinic, Claimant admitted on cross-examination that he was experiencing a flare-up of his gout, and Dr. Seltzer prescribed him medication for it. (Employer's Brief, at 14). It is Claimant's gout and other non-work-related conditions that Employer argues have caused Claimant to remain out of work. Employer asserts that Dr. Roesen's testimony shows that Claimant's gout was not caused by the neuroma surgeries nor did the surgeries cause all of the pain that Claimant is experiencing. (Employer's Brief, at 14-15). Instead, Employer maintains that after the neuromas were removed, the injury Claimant suffered was no longer present, and his pain is instead caused by gout, obesity, diabetes, and high blood pressure. (Employer's Brief, at 15).

Employer also offers that, because Claimant was admittedly fairly inactive following the removal of the neuromas, "his personal conditions associated with morbid obesity, high blood pressure and gout easily explain the ongoing pain which the Claimant indicates he was experiencing." Employer cites Dr. Roesen's testimony to this extent that Claimant's conditions could cause problems and pain in the feet as well as his statements that the pain associated with gout is significantly worse than the pain associated with neuromas. (Employer's Brief, at 16-17).

Employer also asserts that, while the neuromas were removed from the second inner space of the foot, which is located next to the second metatarsal head, the pain of which Claimant complained was actually located in the second metatarsal head, not the second inner space. (Employer's Brief, at 15-16). Further, Employer references Dr. Roesen's testimony regarding a palpable cyst, and argues that this cyst could not have come from walking or standing on hard surfaces at the shipyard because Claimant had been out of work since January 29, 2002. Employer therefore proposes that the cyst could be the cause of the pain Claimant is experiencing. (Employer's Brief, at 16).

Upon cross-examination by Employer, Claimant testified about a previous episode of gout in 2001, and that he was taking the same medication for gout that he took when he had gout in 2001. (TR. at 31-32). Claimant testified that the gout caused him to have swelling in his ankle as well as pain. (TR. at 33). Claimant also testified that he believed the gout was beginning around the time he returned to work because his feet were hurting, he could not stand, he had to leave, and because Dr. Seltzer treated him for gout at that time. (TR. at 34-35).

When Claimant was questioned about the series of events that occurred when the shipyard passed him out of work, Claimant testified that he obtained his medical records from

Dr. Seltzer's office the same day he was passed out of work. However, he did not return to the shipyard clinic because he was not able to walk, and he did not feel that he was able to come back to work. (TR. at 36, 38-39).

Employer also offered as evidence notes from the shipyard clinic; a report from Dr. Mantone dated August 21, 2002; an MRI report dated August 26, 2002; and the deposition of Dr. Roesen, taken February 4, 2004. The notes from the shipyard clinic documented that Claimant found it painful to walk and was not ready to return to work when he was there on August 1, 2002, and also noted Claimant's history of gout. (EX 1a). Dr. Mantone's notes indicate that Claimant has a variety of health problems, including MTP synovitis; metatarsalgia; gout; hypertension; diabetes mellitus; chronic renal insufficiency; morbid obesity; and back pain. (EX 2c). The MRI found "no definitive abnormalities" in the plantar aspect of the right foot, but did find a mild flattening of the second metatarsal head, which Dr. Rinaldi opined could be congenital. (EX 3).

In his deposition, Dr. Roesen testified, among other things, that the pain Claimant was experiencing was located in the area that was immediately next to where the neuromas were located; however, he did not believe that all of the pain was caused by the surgery. (EX 6, at 13, 20). Dr. Roesen opined that Claimant's gout, hypertension, and morbid obesity could cause pain or be complicating factors in Claimant's pain. (EX 6, at 18-19).

Dr. Roesen also testified that Claimant's kidney problems could cause gout, that surgery could either cause or aggravate gout, and that gout could cause pain or be a complicating factor in Claimant's pain. (EX 6, at 10-11, 18-19, 30, 34). Dr. Roesen stated that patients usually develop gout within one to two weeks following surgery, though he had seen patients develop gout as much as four weeks after surgery. (EX 6, at 35). However, Dr. Roesen did not definitively testify as to the cause of Claimant's gout, which according to the medical records and testimony, developed approximately one month after surgery to remove the neuroma on Claimant's right foot.

Upon consideration, I find that the evidence highlighted by Employer does not establish that Claimant's injury at work on January 29, 2002, did not cause, aggravate, or accelerate the condition of Claimant's feet. Employer offers as alternate causes of his condition Claimant's other health problems, specifically gout, hypertension, and obesity. However, Employer offers no specific, comprehensive evidence to support this position. Employer mischaracterizes Dr. Roesen's conclusions as to the possible cause of Claimant's gout. Dr. Roesen never definitively testified as to the cause of the gout, nor did he definitively testify that any of Claimant's other medical conditions were in fact the cause or source of Claimant's pain, although he did testify that he did not believe that the surgeries were the source of all of the pain. Employer's evidence to this extent amounts only to hypotheticals and suppositions. Therefore, I find that this evidence is not specific and comprehensive enough to rebut the Section 20(a) presumption and sever the potential connection between Claimant's injury and his employment.

Employer further supposes that Claimant's current condition cannot be related to the neuromas removed from his feet because Claimant had the same surgery in 1995 and did not experience any problems following that surgery. However, speculation and probabilities do not

rise to the level of specific medical evidence needed to rebut the presumption.

Employer also recounts the events surrounding Claimant being passed out of work after he visited the shipyard clinic. As the record reflects, Claimant was directed to go to the shipyard clinic by his boss and was passed out because he did not have the required medical records. However, the record also shows that Claimant credibly testified that the steel-toed boots that he was required to wear caused pain in his feet, and that prior to going back to work, he had not worn his steel-toed boots. Further, Claimant testified that he had only been working for three hours at the time his boss sent him to the clinic; he also stated that he "needed to try to go back to work." (TR. at 22, 28). To this extent, Employer's speculation that Claimant was out of work because he did not bring his medical records to the clinic fails, as I find that Claimant was experiencing pain from wearing his steel-toed boots, but was making an effort to work through the pain until being directed to the shipyard clinic by his boss.

Based upon the evidence submitted by Employer, I find that Employer has not met its burden of rebutting the Section 20(a) presumption. The evidence offered by Employer does not rise to the level of specificity and comprehensiveness necessary to rebut the presumption. Employer's supposition that Claimant's condition is caused by his other health problems and that Claimant's gout is unrelated to his injury provides little more than suggested alternate causes. Employer in the instant matter fails to provide substantial evidence that specifically and comprehensively establishes that Claimant's employment did not cause, aggravate, or accelerate his injury. Therefore, I find that the Section 20(a) presumption is not rebutted and that Claimant's injury is compensable under the Act.

Nature and Extent of Disability

Claimant in this case seeks an award for temporary total disability benefits commencing April 29, 2002, through the present and continuing. (Claimant's Brief, at 17). Claimant does not contend that he has reached maximum medical improvement; therefore, he is entitled only to temporary compensation. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984).

To establish a prima facie case of total disability, a claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 92 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp*., 8 BRBS 451, 454 (1978). In addition, a claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991).

Claimant testified that he experienced "constant pain" in both of his feet when walking at the time of his injury on January 29, 2002. (TR. at 22). Following the surgeries, Claimant testified that he felt his condition was improving, though he had only worn tennis shoes, not steel-toed shoes which he was required to wear at his job, prior to returning to work on April 28, 2002. (TR. at 22, 28). Claimant's job required him to be on his feet and did not allow him to sit down. (TR. at 25-26). After working for three hours in his steel-toed boots, Claimant testified that he could not get comfortable and was experiencing pain in the same area on both feet. (TR. at 23, 28). Claimant wore Rockport orthopedic shoes to the hearing, which he testified also hurt his feet. (TR. at 29). Claimant also testified that, in addition to not being able to stand or walk for long periods of time, he is also not able to sit in one place for too long because of his back and feet. (TR. at 27). Overall, Claimant testified that he did not feel that he could return to the work he did prior to the neuroma diagnosis and surgery. (TR. at 25-26).

Dr. Roesen testified that on May 1, 2002, he saw Claimant, at which time Claimant complained of a high level of discomfort in both of his feet and in the same areas where he had problems before. (EX 6, at 6-7, 29). At that time, Dr. Roesen took Claimant out of work again for three to four weeks and told Claimant to limit his activity. (EX 6, at 8, 31). Each subsequent time that Dr. Roesen saw Claimant, he complained of pain in the areas of his feet where the neuromas were removed as well as in his heels. (EX 6, at 8, 12-13, 16, 26-27, 35). Dr. Roesen further testified that Claimant's problems arise when he stands for any length of time, and therefore, in his opinion, he could not return to the full duties of the job he had prior to 2002 because of his work-related physical problems. (TR. at 21, 30). Dr. Roesen came to the same conclusion in letters dated October 7, 2003, and October 28, 2003. (CX 1j, 1k).

Claimant's medical records confirm that he complained of pain and walked with a limp when he was directed to the shipyard clinic upon returning to work. (CX 3a; EX 1a). The shipyard clinic's notes also note that Claimant continued to experience a high level of foot pain in August, 2002. (CX 3b; EX 1a-b). Claimant continued to experience pain when he was seen by Dr. Mantone and told Dr. Mantone that he was unable to stand or walk for a long period of time. (EX 2a-b). In his notes from July 14, 2003, Dr. Roesen observed that "[a]t this point it is hard to 'clear' him for any specific job," as Claimant had noted he was in significant pain and could not walk for any period of time. (CX 1g).

Claimant argues in his post-hearing brief that he was still experiencing pain when he was released to return to work. Claimant asserts that he made a good faith attempt to return to work, but upon doing so, he wore steel-toed boots and experienced pain and problems. Claimant saw Dr. Roesen, who again took Claimant out of work. Claimant cites Dr. Roesen's testimony that at least until January, 2003, the "no-work status" for Claimant was appropriate, and at that time, Claimant was only able to stand or walk for five to ten minutes every two hours. (Claimant's Brief, at 17). Further, Claimant argues that because Dr. Roesen has stated that Claimant should severely limit his standing and walking, his pre-injury employment, which requires standing and working on his feet for extended periods of time, clearly conflicts with his restrictions. (Claimant's Brief, at 17).

Based upon the evidence and Claimant's testimony, I find that Claimant was unable to return to his former job and was, therefore, totally disabled beginning on January 29, 2002, the

date on which the first neuroma was removed and following which Claimant was placed on out of work status. I further find that Claimant was totally disabled when he attempted to return to work on April 29, 2002, but was unable to continue because of the pain he experienced when standing and walking and from wear the required footwear (steel-toed shoes) for his job. Claimant has credibly testified that he continues to experience pain. Dr. Roesen's testimony that Claimant should walk or stand for no more than five to ten minutes every two hours and should not return to his full-duty pre-injury employment is credible and unchallenged. As a result, I find that Claimant is totally disabled and unable to return to his regular or usual employment due to his work-related injury.

Suitable Alternate Employment

Claimant has made a prima facie showing that he is totally disabled. Thus, the burden shifts to Employer to show suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984); *Rinaldi v. General Dynamics Corp*., 25 BRBS 128, 131 (1991) (per curiam). If Employer fails to rebut the prima facie case of total disability, Claimant will be considered totally disabled and entitled to temporary total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49, 54 (1988).

To establish suitable alternate employment, the employer must show the existence of realistic job opportunities that the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 201 (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). The job opportunities must be located in the relevant labor market. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380-81 (4th Cir. 1994) (holding that the employer must show availability of employment in the community in which the claimant presently lives). Further, the employer must show the availability of actual, not theoretical, employment opportunities as well as the nature, terms, and pay scales for the alternate jobs. *Manigault*, 22 BRBS at 334 (citing *Thompson v. Lockheed Shipbuilding Constr. Co.*, 21 BRBS 94, 97 (1988)); *Royce v. Erich Constr. Co.*, 17 BRBS 157, 159 (1985); *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978).

The employer also carries the burden of showing the reasonable availability of specific jobs within the job market at critical times. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997); *Turner*, 661 F.2d at 1043. The Fourth Circuit has interpreted "critical time" to mean the time "during which the claimant was able to seek work." *Tann*, 841 F.2d at 543. The date on which suitable alternate employment became available is that date upon which Claimant could have realistically secured employment had he made a diligent effort. *Tann*, 841 F.2d at 542; *Trans-State Dredging*, 731 F.2d at 201 (quoting *Turner*, 661 F.2d at 1042-43). The earliest date on which suitable alternate employment becomes available determines the date on which the extent of a claimant's disability changes, economically and medically speaking, from total to partial disability. *Rinaldi*, 25 BRBS at 130-31 (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)).

When referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exist." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). The employer cannot satisfy its burden of showing suitable alternate employment by identifying only one job opening, as "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id.* The purpose of a labor market survey is not to find the claimant a job, but to determine whether suitable work is available for which the claimant could realistically compete. The courts have consistently held that the employer is not required to become an employment agent for the claimant. *Tann*, 841 F.2d at 543; *see also Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employer may meet this burden of showing suitable alternate employment by "presenting evidence of jobs which, although no longer open when located, were available during the time claimant was able to work." *Tann*, 841 F.2d at 543.

Labor Market Survey

A labor market survey was completed by Mr. William Kay on June 12, 2003, after Claimant's case was referred to Mr. Kay by Janice Mallory, Case Manager for Employer on April 24, 2003. (EX 4a). After meeting with Claimant on May 6, 2003, Mr. Kay found nine positions that he believed were compatible with Claimant's transferable skills and the physical capabilities documented by Drs. Seltzer and Roesen. Based on these nine positions, Mr. Kay asserted that Claimant has a potential wage earning capacity of $10.10 per hour, or $404.00 per week, and an average wage earning capacity of $6.50 per hour, or $260.00 per week. (EX 4b-c).

According to the labor market survey, Mr. Kay considered Claimant's personnel records from the shipyard, his medical records, the previous restrictions place upon him by Drs. Waterhouse and DiMartino, the *Dictionary of Occupational Titles* (4th Edition), the *Classification of Jobs* (5th Edition), the Virginia Employment Commission, Economic Services Division, "Industry and Occupation Employment Projections: 1996-2006," and the OASYS program. (EX 4c-e).

Mr. Kay also tested Claimant's vocational and educational abilities. On a scale of one to six (with six being the highest), Claimant tested at Level 2 for reasoning, mathematical, and language development. Mr. Kay noted that Claimant completed high school and attended one year at the Apprentice School. (EX 4f). On the Wonderlic Basic Skills Test, Claimant scored at grade level 9.5 for verbal skills and grade level 12.5 for quantitative skills, yielding a composite grade level of 12. (EX 4g).

Per instructions from Employer, Mr. Kay looked for positions that fell under the category "Light Duty." (EX 4d). This definition stated:

> Exerting up to 20lbs. of force occasionally, and/or up to 10lbs. of force frequently, and/or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it require walking or standing to a significant degree; or (2)

> when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of material even though the weight of those materials is negligible.

(EX 4e). Mr. Kay testified during the hearing that he took the "Light Duty" definition from "a service that I use for finding different information when I'm doing transferable skills analysis . . . and classification of jobs." (TR. at 53). Mr. Kay clarified that "a job that requires walking or standing to a significant degree . . . would be considered light duty work" under this definition. (TR. at 74). Mr. Kay also testified that he took his own observations of Claimant's physical conditions into account, specifically, Claimant's inability to stand or walk for long periods of time. (TR. at 54, 73). Mr. Kay testified that he felt Claimant could perform the jobs identified both physically and educationally. (TR. at 60, 63, 67).

Mr. Kay also wrote in the labor market survey that he took into account Claimant's permanent physical restrictions from previous injuries. On June 5, 1996, Claimant had the following permanent restrictions imposed upon him following a neck injury: (1) Limited lifting to 40lbs; (2) No overhead work; (3) Limited bending, stooping, reaching; (4) Wear Light weight hard hat. (EX 4e). Claimant had additional permanent restrictions imposed upon him on January 18, 2001: (1) no overhead work; (2) Lift to 25lbs; (3) Ladders to/from job site only; and (4) Minimal bend, twist, stooping. (EX 4e).

Mr. Kay identified four areas of career alternatives for Claimant: (1) Customer Service, entry level; (2) unarmed security; (3) cashier; and (4) dispatcher. (EX 4i). The following is a summary of the potential employers and positions identified by Mr. Kay, as well the job duties of each of the positions.

1. Goodwill Industries, Newport News, Virginia, *Donation Center Attendant*

This position would require an individual to provide donors with receipts for donations and information concerning Goodwill Industries. The individual is also expected to greet individuals pleasantly and professionally, accept and sort donations, and maintain records of donated merchandise. He or she must also keep the donation center clean and free of debris, and secure the donation center at the end of the shift. The attendant must not leave the center unattended, and if the attendant goes on break, is expected to put a sign in the window indicating the time of return. This employer noted that it would make accommodations as needed and "never requires work outside of restrictions." (EX 4n). To the extent an individual would engage in physical activity, the attendant could stand or walk as desired, with no more than thirty minutes of either. The attendant would be expected to work with arms extended at shoulder level for no more than two hours per day, to stoop for "minutes per day," to occasionally push or pull, and to sit for six to seven hours per day. (EX 4n). As to lifting twenty pounds, Goodwill stated that it could accommodate the attendant.

As of June 10, 2003, this business was taking applications. Goodwill Industries was also hiring and taking applications in March, 2002; April, 2002; June, 2002; August, 2002, October,

2002, February, 2003; and April, 2003. (EX 4j). The hourly wage is $5.15. Under "Hours per week" is listed "PT: 16-24 & FT: 32-40." (EX 4n).

2. Wal-Mart, Chesapeake, Virginia, *Greeter*

This position requires an individual to greet customers, check receipts when customers leave the store, and to check merchandise that is being returned to the store by placing a sticker on the merchandise. The greeter would also be expected to assist elderly and other customers with carts and packages as needed and be able to follow written or oral instructions. The store would also provide a stool to allow the greeter to sit or stand. For greeters in the Garden Center, a heated booth may be provided. As to physical activity, the job would allow the individual to stand, walk, or sit during the six-to-eight hour shift, lifting up to five pounds, and would require occasional pushing or pulling of a cart. The individual would get a fifteen minute break in both the morning and afternoon, with a break for lunch. (EX 4o).

As of June 10, 2003, this business was taking applications. Mr. Kay noted in the labor market survey that Wal-Mart hires four to five individuals for this position per year. Wal-Mart was also hiring and taking applications in November, 2001; March, 2002; May, 2002, and June, 2002. (EX 4j). The hourly wage is listed as "$6.25+." Under "Hours per week" is listed "25-35." (EX 4o).

3. Security Services of America, Newport News, Virginia, *Unarmed Security*

This position would require monitoring tour groups at hotels. It would allow the individual to sit at a desk and monitor people entering and leaving the area and to prevent group members from going to other rooms. The security person would also be expected to "perform routine hall check twice an hour. (Usually requiring 10 min.)" and to keep a security report. The individual would be trained, and it was noted that the employer would "accommodate for disabilities." Physically, the job would allow the individual to sit during most of the seven hour shift, and to stand or walk as desired. He or she would also be required to be able to lift five pounds and could take occasional breaks as desired. (EX 4p).

As of June 10, 2003, this business had no openings, but Mr. Kay was told that it had hired the previous month, and that Security Services "has hired monthly since taking over Clemons security 11/99." Mr. Kay noted in the labor market survey that he placed clients there in December, 2002, and March, 2003. (EX 4k). The hourly wage is listed as $7.00. Under "Hours per week" is listed "37 hrs. may start part time." (EX 4p).

4. Atlantic Protective Services, Virginia Beach, Virginia, *Unarmed Security Guard*

This position would require the guard to monitor library activity at Norfolk City Public Libraries and would allow him or her to sit, stand, or walk as desired. The employer noted a willingness to accommodate shifts and would require the individual to pass a background check and obtain a license after training. No lifting would be required. (EX 4q).

As of June 10, 2003, this business was hiring for various positions. Mr. Kay noted in the labor market survey that Atlantic Protective Services "[h]ired Genex clients in June, 2002; August, 2002; September, 2002; October, 2002; and January, 2003. (EX 4k). The hourly wage is listed as "$5.15 training." Under "Hours per week" is listed "12 PT or 40 FT." (EX 4q).

5. Express Car Wash, Hampton, Virginia, *Cashier*

This position would require an individual to greet customers, take order requests, take money and credit cards, and stock shelves with candy and cigarettes. The cashier would be expected to keep the counter clean as well. Experience is preferred, though it is noted that on-the-job training is provided, and the individual must undergo a credit background check. The cashier would be expected to work with his or her arms extended at shoulder level for thirty minutes per day, and would allow him to stand or walk as desired, or to sit for most of the eight-hour shift behind a desk in the main building. Lifting requirements would be less than ten pounds. (EX 4r).

As of June 10, 2003, this business was taking applications. Mr. Kay noted in the labor market survey that Express Car Wash hires four to five individuals for this position per year and "has hired throughout the time of the LMS." (EX 4*l*). The hourly wage is listed as $6.00. This is a 40 hour per week position. (EX 4r).

6. Chesapeake Toll Road, Chesapeake, Virginia, *Toll Collector*

This position would require the toll collector to receive and account for money, assess and record appropriate tolls, and maintain order and cleanliness in the toll house. Under qualifications, the individual would be required to have "some understanding of the basic concepts of electronic toll collection;" general knowledge of cashiering duties; ability to do simple math and count money with speed and accuracy; to serve the public courteously; "some clerical experience of a reasonable nature;" and any combination of education and experience equivalent to graduating from high school. Physically, this position would require occasional stooping and walking, and would permit the individual to sit or stand as desired during the eight-hour shift. The toll collector would not be expected to lift more than ten pounds. (EX 4s).

As of June 12, 2003, this business was not hiring. Mr. Kay noted in the labor market survey that Chesapeake Toll Road was hiring in March, 2002; April, 2002; May, 2002; and December, 2002. (EX 4*l*). The hourly wage is listed as $8.50. This is a 40 hour per week position. (EX 4s).

7. Norfolk Airport Authority, Norfolk, Virginia, *Parking Cashier*

The duties of this job include monitoring parking lots from a small heated and air-conditioned booth and collecting fees from customers as they leave the parking lot. The cashier would also be required to contact authorities as needed for incidents of accidents or behavior and meet the public in a prompt and courteous manner. The cashier "may patrol parking lot on foot to check license plates" and would be required to have a high school diploma, a valid driver's license, and a good driving record. Physically, the parking cashier would walk to patrol the

parking lot for two hours per day; sit or stand as needed for six hours per day; and occasionally climb stairs. (EX 4t).

As of June 12, 2003, this business was not hiring. Mr. Kay noted that Norfolk Airport Authority had hired the previous month and had previously hired in April, 2002; July, 2002; April, 2003, and May, 2003. (EX 4*l*). The hourly wage is listed as "$10.10/hr .65 dif." Under "Hours per week" is listed "24-40." (EX 4t).

8. Associated Cabs, Newport News, Virginia, *Dispatcher*

This position would require the dispatcher to answer incoming calls and dispatch taxi cabs using radio communication equipment and to empty the office trash can at the end of the shift. The dispatcher would perform all duties while seated at a desk and would be required to lift the trash can (approximately three pounds). The dispatcher could stand or walk by choice. No high school diploma or previous experience is required, and the employer would provide the required training. (EX 4u).

As of June 10, 2003, this business was taking applications. Mr. Kay noted Associated Cabs was also hiring in August, 2002; December, 2002; January, 2003; and March, 2003. (EX 4m). The hourly wage is listed as "$6.00/hr after training." Under "Hours per week" is listed 16-40. It is also noted that this business hires three to four individuals per year. (EX 4u).

9. Digital Security, Hampton, Virginia, *Central Station Operator*

This position would require the operator to monitor computers for alarm activity; answer telephone calls; and provide customer service to customers and potential customers. The operator would also dispatch emergency services to appropriate alarm locations; maintain office and documentation; and be able to work a rotating shift. The employer noted that it would train the individual hired for all duties. Physically, the position would allow the individual to sit or stand as needed. (EX 4v).

As of June 10, 2003, this business was taking applications. Digital Security was also hiring in August, 2002, and December, 2002. (EX 4m). The hourly wage is listed as $5.15. This is a 30 hour per week job. (EX 4v).

Analysis

Employer argues that the nine positions, as outlined in the labor market survey, constitute suitable alternate employment within Claimant's work restrictions and abilities and that Claimant could obtain if he diligently tried. (Employer's Brief, at 18-19). Employer asserts that these positions are sedentary in nature and would not require Claimant to walk more than five to ten minutes every two hours, which Dr. Roesen indicated would be appropriate for Claimant. (Employer's Brief at 19). Because Claimant did not establish that he sought any employment since last working at the shipyard, Employer argues that Claimant maintains a wage earning capacity such that his disability is at most temporary and partial. (Employer's Brief, at 19-20).

Claimant argues that the evidence is insufficient to show that the positions identified by Employer are suitable or appropriate for him. (Claimant's Brief, at 21). In support of this argument, Claimant asserts that Employer never took any steps to ascertain from Dr. Roesen what Claimant's physical restrictions were and instead utilized a "light duty" capacity as outlined in the labor market survey. (Claimant's Brief, at 22 (citing EX 4e)). Claimant argues that the "light duty" definition "does not comport to the level of Mr. Shearon's limitations during the relevant periods." (Claimant's Brief, at 22).

Based upon the testimony and evidence, I make the following findings with regard to whether the positions offered by Employer constitute suitable alternate employment. Overall, I find that the labor market survey supports the conclusion that the jobs were available during the period of claimed disability.[3] It is also to be noted that Dr. Roesen did not specifically clear Claimant for any specific job as of July 14, 2003. (EX 1g). However, Dr. Roesen did testify during his deposition that Claimant could have done sedentary work as of the time he saw him in January, 2003. (EX 6, at 32).

In addition, the evidence supports the conclusion that all of the jobs identified in the labor market survey are within Claimant's geographic area, except for the job at the Chesapeake Toll Road.[4] The Chesapeake Toll Road toll collector position would be located at the toll booth in close proximity to the North Carolina border. Given that Claimant lives in Newport News, Virginia, a distance which is considerably far from the Chesapeake, Virginia/North Carolina border, I cannot find that the geographic location of this position is within an appropriate proximity to where Claimant resides. I do find that the position at the Wal-Mart in Chesapeake, Virginia, is however in close enough proximity to Claimant's residence. The Chesapeake Square area, where Mr. Kay noted the position would be, is located in very close proximity to Interstate 664, in the northwest corner of the city, whereas the toll road booth is located in the far southeast corner of the city. Therefore, the position of toll collector on the Chesapeake Toll Road will not be considered suitable.

First, as to the position of donation center attendant for Goodwill Industries, I find that this position constitutes suitable alternate employment, considering Claimant's age, experience, physical restrictions, and work experience. As previously stated, this job is generally available within Claimant's geographic area during Claimant's disability. Although Dr. Roesen did not approve this position, his testimony yields that Claimant could perform sedentary work, so long as he was not required to stand or walk more than five to ten minutes every two hours. This particular job would allow Claimant to walk, stand, or sit as he desired. Further, Goodwill Industries specifically stated that it would make accommodations for someone in Claimant's circumstance and does not make individuals work outside of their restrictions. Therefore, I find that this position constitutes suitable alternate employment.

As to the position of greeter at Wal-Mart, I also find that this position constitutes suitable alternate employment, considering Claimant's age, experience, physical restrictions, and work

[3] All of the positions were either currently hiring or taking applications or had hired in the period of time since Claimant became disabled. (EX 4).

[4] Claimant lives in Newport News, Virginia. All of the jobs identified in the labor market survey are located in or near Newport News, Virginia. (EX 4).

experience, and is within his geographic area. The job was also available during the appropriate time periods as noted. Claimant would be allowed to alternate sitting, standing, and walking and would be provided a stool to sit on. I also do not find that the lifting requirement of five pounds is outside of Claimant's restrictions. Therefore, I find that this position represents suitable alternate employment.

I find that the unarmed security position with Security Services of America does not constitute suitable alternate employment. Under "Job Duties," the labor market survey states that the individual would be required to "perform routine hall check twice an hour (Usually requiring 10 min.)." (EX 4p). There is no indication that the "hall check" could be performed from a seated position at the desk (such as if there were security cameras in the hallways feeding into a security monitor system at the desk). Although the employer notes that it "will accommodate for disabilities," Employer has not shown what appropriate accommodations could be made for someone such as Claimant, who Dr. Roesen states should not walk for more than five to ten minutes in a two hour period. Were Claimant to perform hall checks for this employer, he would be required to stand or walk for at least ten minutes per hour and possibly as much as twenty minutes per hour.[5] Further, there is no indication that the ten minute estimate to perform hall checks is based on a normal individual's walking capabilities or whether it is based on someone with the limited walking capabilities of Claimant. If it were based on the former, then surely Claimant could not be expected to perform the hall checks in ten minutes given his physical condition. Therefore, I find that this position does not constitute suitable alternate employment.

The position with Atlantic Protective Services of a security monitor at Norfolk City Public Libraries does not constitute suitable alternate employment. While it is noted that the individual could stand, sit, or walk as desired, Employer has failed to explain how someone such as Claimant could adequately monitor the activities in the library and perform the job without walking around at least a minimal amount and possibly a moderate amount depending upon the actual activities within the library. Also, Employer fails to explain how someone such as Claimant could monitor multiple floors or levels of a library without physically going to that location at some routine interval. I find that Claimant has failed sustain its burden in proving that the security position with Atlantic Protective Services constitutes suitable alternate employment within the physical restrictions placed upon Claimant.

The cashier position at Express Car Wash in Hampton, Virginia, constitutes suitable alternate employment, considering Claimant's age, experience, physical restrictions, and work experience. This job is generally available within Claimant's geographic area during Claimant's disability, and this position falls into the category of sedentary work, which Dr. Roesen testified Claimant could perform. This particular job would also allow Claimant to walk, stand, or sit as he desired. Although this position noted that previous experience was preferred, it also noted that on-the-job training was provided. Given Claimant's educational testing results, I find that Claimant could be trained to perform this position. Therefore, I find that this position represents suitable alternate employment.

[5] It is not entirely clear from the "Job Duties" list whether each hall check takes ten minutes, or whether the total time spent checking the hall each hour would be ten minutes. Regardless, in either situation Claimant would be exceeding the amount of time Dr. Roesen stated he could stand or walk per every two hours.

The position of parking cashier with the Norfolk Airport Authority does not constitute suitable alternate employment. While it is noted in the labor market survey that the parking cashier could stand or sit as needed for six hours per day, the cashier would also be required to walk in order to patrol the parking lot for two hours per day. This latter requirement is clearly outside of the restrictions recommended by Dr. Roesen. Further, there is no indication that this employer would make any accommodation for someone in Claimant's condition. Therefore, I find that this position does not constitute suitable alternate employment.

The dispatcher position at Associated Cabs in Newport News, Virginia, does constitute suitable alternate employment. This position falls into the category of sedentary work, which Dr. Roesen testified Claimant could perform, and would allow Claimant to walk, stand, or sit as he desired. This position requires no previous experience and also notes that on-the-job training is provided. Given Claimant's educational testing results, I find that Claimant could be trained to perform this position. Therefore, I find that this position represents suitable alternate employment.

Finally, as to the position of central station operator with Digital Security in Hampton, Virginia, I find that this position also constitutes suitable alternate employment. It would allow Claimant to walk, stand, or sit as he desired, and training would be provided for all duties including the use of the computer and filling out appropriate documentation. Given Claimant's educational testing results, I find that Claimant could be trained to perform this position. Therefore, I find that this position represents suitable alternate employment.

In summary, I find that Employer has met its burden of proving that the following five positions constitute suitable alternate employment: (1) donation center attendant with Goodwill Industries; (2) greeter at Wal-Mart; (3) cashier at Express Car Wash; (4) dispatcher with Associated Cabs; and (5) central station operator with Digital Security. The positions of unarmed security with Security Services of America; security monitor with Atlantic Protective Services; and parking cashier with Norfolk Airport Authority do not constitute suitable alternate employment because the positions do not comport with the physical restrictions Claimant has. The position of toll collector at the Chesapeake Toll Road does not constitute suitable alternate employment because it is outside the appropriate geographic location.

I find that these jobs represent a range of available jobs for which Claimant could realistically compete. Because Employer has satisfied its burden of establishing the existence of suitable alternate employment, I will next consider whether the evidence demonstrates that Claimant diligently sought employment.

Diligent Employment Search

Once an employer meets its burden of showing that suitable alternate employment is available to a claimant if that claimant diligently seeks it, the claimant bears a complementary burden and "may still establish disability by showing that he has diligently sought appropriate employment but has been unable to secure it." *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) (citing *Trans-State Dredging*, 731 F.2d at 200); *see also*

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043 (5th Cir. 1981). Further, the claimant need not seek jobs identical to those identified by the employer as suitable alternate employment. *Palombo*, 937 F.2d at 74. The employment need only be "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Trans-State Dredging*, 731 F.2d at 202. However, the jobs that a claimant seeks must be "appropriate" and consistent with the claimant's physical restrictions. *See Tann*, 841 F.2d at 543-44 (finding that claimant's work as a farmhand was not appropriate work given that claimant was physically restricted from doing extensive lifting, climbing, walking, and standing). Further, if a claimant "offers evidence that he diligently tried to find a suitable job, . . . the ALJ should make specific findings regarding the nature and sufficiency of claimant's alleged efforts." *Palombo*, 937 F.2d at 75. The likelihood of a finding that the claimant diligently sought employment is reduced where the claimant fails to seek employment for a significant period of time. *Tann*, 841 F.2d at 544. The claimant also bears the burden of showing that he is willing to work. *Trans-State Dredging*, 731 F.2d at 201. The Board has previously held that injured claimants must cooperate with vocational consultants, and failure to do so may contribute to a finding of lack of willingness to work. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 102 (1985).

If a claimant proves that he diligently sought employment, the finding of total disability may be reinstated. *Palombo*, 937 F.2d at 75; *Tann*, 841 F.2d at 542. If a claimant does not meet his burden of proof as to whether he diligently sought employment, the claimant will be considered only partially disabled and will be limited to the recovery that is provided for in the applicable schedule under Section 8 of the Act. 33 U.S.C. §908(c) (2002); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 274 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998).

Claimant does not assert either in his post-hearing brief or in his testimony that he sought employment of any type at any relevant time period. Claimant did testify that he had received the list of jobs from Mr. Kay; however, he had not applied for any of those jobs at the time of the hearing. (TR. at 39-40; 43). Mr. Kay also testified that Claimant told him that he had not been actively seeking work. (TR. at 52).

Therefore, I find, based upon the evidence, that Claimant did not engage in a diligent search for employment. As a result, Claimant's claim for temporary total disability from April 29, 2002, **to the present and continuing** must be denied.

Date of Availability of Suitable Alternate Employment

Total disability becomes partial on the date that Employer establishes suitable alternative employment. *Rinaldi*, 25 BRBS at 130-31 (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)). Employer established suitable alternative employment when Mr. Kay completed the labor market survey, which is dated June 12, 2003. (EX 4a). Claimant states in his brief that "Employer's own survey supports an award of temporary partial disability benefits in Mr. Shearon's favor from January 23, 2003 to the present and continuing." (Claimant's Brief, at 22). Claimant also asks at the conclusion of his brief that if an award of temporary total disability from January 29, 2002, through the present and continuing is not

awarded, that temporary total disability benefits be awarded from January 29, 2002, through January 23, 2003, and than an award of temporary partial disability benefits be awarded from January 24, 2003, through the present and continuing. (Claimant's Brief, at 23). The date of January 23, 2003, coincides with the date on which Dr. Roesen testified Claimant would have been able to perform sedentary work. (EX 6, at 32).

In the labor market survey, the job of donation center attendant for Goodwill Industries was noted as being available beginning in June, 2002, and several subsequent dates, including June 10, 2003. (EX 4j). The position of greeter at Wal-Mart was available in May, 2002, June, 2002, and June, 2003. (EX 4j). Express Car Wash was taking applications for the cashier position on June 10, 2003, and the labor market survey noted that this position had been hired for throughout the time of the labor market survey. (EX 4*l*, 4r). The dispatcher position at Associated Cabs was available in August, 2002, and on four subsequent occasions, including June 10, 2003. (EX 4m). Finally, the position of central station operator with Digital Security was available in August, 2002, December, 2002, and June, 2003. (EX 4m).

Claimant's apparent argument that Claimant was not able to perform sedentary work until January 23, 2003, and therefore is entitled to temporary total disability until that date fails. Claimant is essentially arguing that Dr. Roesen did not approve these positions as appropriate until January 23, 2003. However, there is no requirement that a treating physician actually approve the positions in the course of Employer establishing that suitable alternate employment exists, nor that such approval be given for the positions to necessarily be "available" to a claimant. While the opinion of the treating physician may well be applicable in determining the suitability of alternate employment, it does not necessarily comport that this date will also determine when suitable alternate employment was actually available.

I find that Claimant is entitled to temporary total disability from April 29, 2002, until June 17, 2002, when the disability became partial. The medical evidence shows that Claimant was taken out of work from January 29, 2002, through June 17, 2002. (CX 1e). The record contains no other out of work or return to work slips. The labor market survey also shows that that position of donation center attendant and greeter were both available in June, 2002. Therefore, I find that Claimant was released by his physician to return to work on June 17, 2002, and on that date, his disability became partial. The parties have stipulated that Claimant was also temporarily totally disabled from January 29, 2002, until April 28, 2002. (JX 1). The parties have also stipulated that Claimant's former average weekly wage had been $778.14, resulting in a compensation rate of $518.76 per week. As a result, Claimant is entitled to temporary total disability from January 29, 2002, until June 17, 2002, in the amount of $518.76 per week.

Wage-Earning Capacity

Pursuant to Section 8(e) of the Act,

> In the case of temporary partial disability resulting in decrease in earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning

capacity after the injury in the same or another employment, to be paid during the continuance of the disability, but shall not be paid for a period exceeding five years.

Section 8(h) of the Act provides that an injured employee's wage-earning capacity after injury under Section 8(e) shall be determined after consideration is given to "the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition." 33 U.S.C. §908(h). Where the claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984).

Mr. Kay's labor market survey established that Claimant had a wage-earning capacity of $6.50 per hour for full-time work, or $260.00 per week. (EX 4b). Claimant does not contest that this amount does not represent Claimant's wage-earning capacity. (Claimant's Brief, at 22). The parties stipulated that Claimant's former average weekly wage had been $778.14. (JX 1). Therefore, Claimant's weekly loss of wages is equal to $518.14, and Claimant is entitled to compensation in the amount of $345.43 per week beginning June 18, 2002, through the present and continuing.

Order

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay to Claimant, William K. Shearon, compensation for temporary total disability from January 29, 2002, until June 17, 2002, at the stipulated compensation rate of $518.76 per week;

2. Employer, Newport News Shipbuilding and Dry Dock Company, is also hereby ordered to pay to Claimant, William K. Shearon, compensation for temporary partial disability from June 18, 2002, through the present and continuing, at the rate of $345.43 per week;

3. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

4. Employer shall receive credit for any compensation already paid;

5. Interest at the rate specified in 28 U.S.C.§1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

6. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge